

***United States Court of Appeals
for the Second Circuit***



**PETITION FOR
REHEARING**

77-1249

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 77-1249

UNITED STATES OF AMERICA,

Appellee,

—V.—

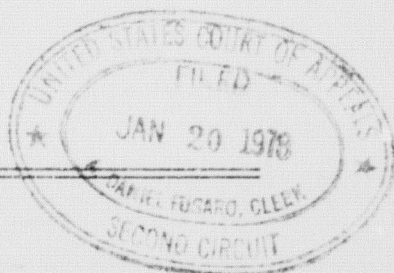
BARTHOLOMEW BUIGUES, ANGELO PUIG, IRMA
ANES, SUSAN HOROWITZ, and JOHN SAM-
MARCO,

Defendants-Appellants.

PETITION OF THE UNITED STATES OF AMERICA FOR REHEARING

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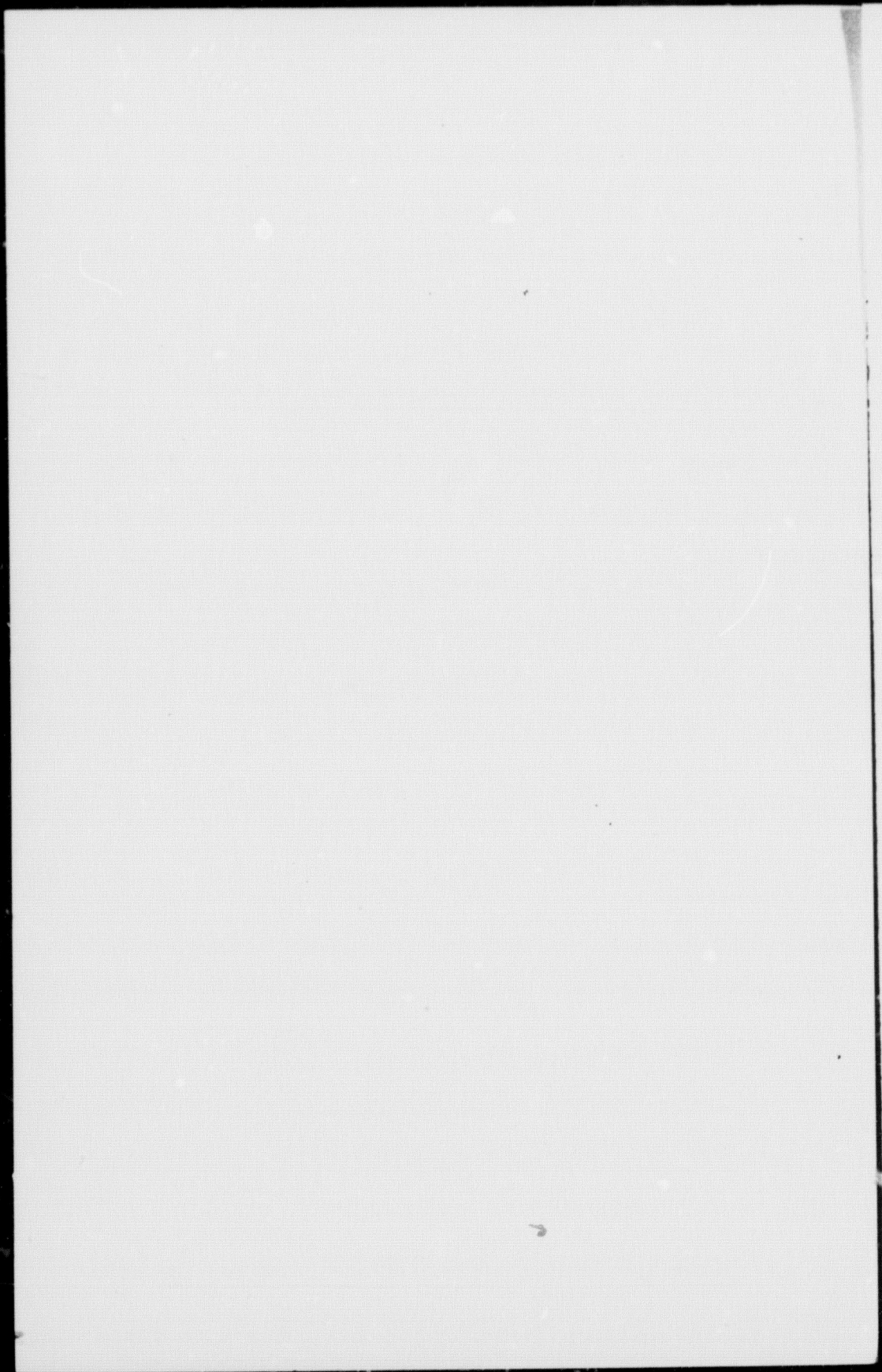


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Preliminary Statement

The United States of America respectfully petitions for rehearing of that portion of the opinion of a panel of this Court (Moore, Feinberg, and Mulligan, C.JJ.) reversing the conviction of Susan Horowitz and dismissing the indictment as to her. *United States v. Bartholomew Buigues, et al.*, Dkt. No. 77-1249, slip op. 977 (January 6, 1978).

The above-captioned appeal was argued on September 26, 1977. On January 6, 1978 this Court filed an opinion affirming the convictions of Buigues, Puig, Anes, and Sammarco and reversing the conviction of Horowitz. The Government seeks rehearing only of the reversal of Horowitz' conviction. Along with her co-defendants, Horowitz had been convicted of conspiracy to defraud the United States and to file false claims against the United

States, in violation of Title 18, United States Code, Section 371, and of two counts of filing false claims against the United States in violation of Title 18, United States Code, Section 287.

Reasons For This Petition

The Government respectfully submits this petition for rehearing because we believe the panel's decision violates the well settled principles that an appellate court in reviewing a conviction for sufficiency "may not substitute [its] own view of the evidence for that of the jury," *United States v. Sears*, 544 F.2d 585, 586 (2d Cir. 1976), and that the evidence must be viewed in the light most favorable to the Government. *Glasser v. United States*, 315 U.S. 60, 80 (1942); *United States v. Amrep Corporation*, 560 F.2d 539, 543 (2d Cir. 1977), *cert. denied*, — U.S. — (January 10, 1978); *United States v. Greenberg*, 534 F.2d 523, 524 (2d Cir.), *cert. denied*, 429 U.S. 831 (1976); *United States v. Frank*, 494 F.2d 145, 153 (2d Cir.), *cert. denied*, 419 U.S. 828 (1974). The panel's opinion not only disregards the jury's right "to determine issues of credibility, weigh the evidence, and draw reasonable inferences of fact," *United States v. Greenberg, supra*, 534 F.2d at 524, but in evaluating the evidence against Horowitz it relies principally on the testimony of three defense witnesses, Puig, Anes, and Massielli, which the jury had every right to reject. This case is thus squarely governed by *United States v. Greenberg, supra*, where "appellant Greenberg offered evidence to contradict the Government's proof but the jury resolved the questions of fact against him."

While we recognize that the panel's opinion does not establish a new legal principle deleterious to the ability of the Government to prosecute in the future those who violated the law, we still believe this petition for rehearing should be granted. By disregarding established legal principles the panel has permitted a defendant who re-

ceived a fair trial to avoid conviction for the serious crime of defrauding a social welfare program designed to help lower income citizens. Horowitz' actions undermined public confidence in the integrity of these programs; her criminal conviction for that crime should stand.

ARGUMENT

POINT I

The Testimony of the Witnesses Who Supported Horowitz Was Unworthy of Belief and Was Properly Rejected by the Jury.

That portion of the Court's opinion devoted to Horowitz' contentions places great reliance on the testimony of defense witnesses Anes, Puig, and Massielli. *United States v. Buigues*, Dkt. No. 77-1249, slip op. 977, 986-87. After summarizing this testimony, the Court noted that "the only evidence which involved [Horowitz] *would have justified an inference* that she fulfilled the function set for her by YIG, namely, the early morning inspection at the vendor's plant." (Italics supplied). *United States v. Buigues*, *supra*, slip op. at 987. Although the evidence would have justified this inference, it is not the inference that the jury drew. This inference would have been built entirely on the testimony of Puig, Anes, and Massielli, which the jury was certainly entitled to disbelieve.

In its brief on appeal, the Government did not present any evaluation of the credibility of Puig, Anes, or Massielli, because we assumed that their testimony, having been rejected by the jury, would not be given serious consideration by this Court. Since this Court apparently has accorded the testimony some weight, we think it proper to set forth in greater detail why the jury rejected it.

In its opinion, the Court cited, and apparently accepted, Puig's testimony that Horowitz' duties consisted of visiting the vendor between 6:00 A.M. and 9:00 A.M. each morning and supervising the distribution of the lunches. The Government offered evidence, however, that Puig had on an earlier occasion given an account of her duties that was totally at variance with his trial testimony. On March 9, 1976, Puig was interviewed in the United States Attorney's Office. According to Carl Bogan, the Government investigator who testified at trial, Puig described Horowitz during this interview as a "trouble-shooter." Her duties, he stated, were similar to those of Sammarco and consisted of working out problems with officials of the Department of Agriculture. Puig also stated during this interview that Horowitz worked "full time" as a "trouble-shooter" (Tr. 497-98). Puig never made any mention of Horowitz' supposed duties as a "vendor liaison." During his trial testimony, however, Puig insisted that Horowitz' sole function was dealing with the vendor and that nothing more was required of her. (Tr. 850). From all this the jury was entitled to draw two conclusions about Puig's testimony. First, Puig's earlier account of Horowitz' role casts considerable doubt on the veracity of his trial testimony about her. Second, the pronounced divergence in Puig's stories suggests that he did not have the slightest idea what Horowitz did or what her hours were. The totality of the evidence scarcely suggests that his trial testimony should be taken at face value by this Court.

The testimony of Irma Anes was equally unworthy of belief. Her account of Horowitz' activities at the vendor (Tr. 724-26), cited by the Court in its opinion, could not possibly have been based on first hand knowledge. Anes never visited the vendor with Horowitz, and, indeed, had another full time job that prevented her from doing any work at all for Youth In Government during the day. According to her testimony she worked every night at Youth In Government from 6:00 P.M. until 1:00 A.M.

(Tr. 732). In her testimony, Anes was not content to ascribe to Horowitz the duties of a "vendor's liaison"; she went even further. According to Anes, Horowitz' dedication to the lunch program was such that she paid occasional visits to the Youth In Government offices late at night. (Tr. 732). We submit that the jury was no more required to believe this testimony than Anes' incredible contention that Pedro Rodriguez, a monitor, inspired the false payroll entries and that Buigues knew nothing of them. (Tr. 739-41).

Finally, in support of the proposition that Horowitz worked regularly for Youth In Government this Court cited the testimony of Nat Massielli, an employee of AM-PM Food Services, Youth In Government's vendor. This testimony, too, was open to serious question. First, his bias in the case was apparent: AM-PM received \$130,000 from Youth In Government during the summer of 1975, and between \$100,000 and \$200,000 in the summer of 1976. (Tr. 639-42). The conviction of the leaders of Youth In Government, and their resulting exclusion from future participation in the summer lunch program, was scarcely in AM-PM's interest. Second, it is apparent from the record that even Judge Pollack had serious doubts about Massielli's veracity. Toward the end of his testimony Judge Pollack excused the jury and admonished a spectator in the back of the courtroom not to coach the witness by signalling answers to questions. The spectator identified himself as an employee of AM-PM. Judge Pollack also expressed some concern that the jury might have observed these gestures. (Tr. 650-51). This incident, hardly a common occurrence in trials, surely entitled the jury to view Massielli's testimony with some skepticism. That testimony is entitled to no greater credence in this Court than it was accorded by the jury.

In sum, it was well within the jury's province to reject all of the testimony on which this Court based its

conclusion that Horowitz worked regularly for AM-PM as a "vendor-liaison." Their verdict of guilty strongly suggests that they did reject it, and that determination, we submit, is binding on this Court.

POINT II

The Government's Evidence Against Horowitz Was Sufficient.

The Court's opinion (slip op. at 987) suggests that the Government's proof of Horowitz' involvement in the scheme to defraud the Government consisted of no more than testimony from several witnesses that she was not seen at the Youth In Government office located at 2176 Amsterdam Avenue. The Government's proof was far more extensive than that, and was clearly sufficient to warrant conviction.

The Government offered ample proof that Horowitz' job at Youth In Government was a sham and that she performed little or no work. Four employees of Youth In Government testified that on June 27, 1975, the Friday before the program was to commence, Puig introduced Horowitz to them as their supervisor. No mention was made of her being a "vendor liaison." It is undisputed that thereafter Horowitz did no supervising and was indeed never seen again by any of the Youth In Government monitors. Horowitz further contributed to the pretense that she was a supervisor by completing a Youth In Government employment application in which she stated that the position she was applying for was "summer program supervisor." This application (GX 8) was dated June 27, 1975, the very day Puig introduced her as a supervisor to the other employees. Only eleven days earlier, on June 16, 1975, she had submitted an employment application to the Arawak Consulting Corporation

(GX 17) in which she stated that she was able to start work "immediately." This application was submitted to Arawak at a time when, according to the theory of her defense at trial, she was working daily to establish the summer lunch program.

From all this, and from Horowitz' regular employment at Arawak from July 7, 1975 onward, the jury was entitled to infer that she did nothing to earn her salary at Youth In Government. Furthermore, the evidence is compelling that the job of "vendor liaison" was one that never existed and for which there was no need. Indeed, in her own counsel's opening statement, this position was characterized in the following terms: "Susan Horowitz had a very small, limited function;" "a vendor's liaison—and the title may sound grandiose—is practically nothing;" the job was "mechanical and actually superficial and actually not that essential." (Tr. 23-24). These characterizations are amply borne out by the record. The proposed budget submitted by Youth In Government to the Department of Agriculture (Defendant's Exhibit D) listed all proposed job titles and salaries; there was no mention whatever of the position of "vendor liaison".* Because the Department of Agriculture reduced Youth In Government's appropriation by approximately 1/3, Youth In Government made a substantial cut both in size of salaries and in quantity of jobs. Nevertheless, despite the budget reductions Horowitz asked the jury to believe

* The proposed budget read as follows:

- "1-Director—Twelve weeks—\$250 per week
- 1-Assistant Director—\$185 per week
- 1-Administrative Chief—Twelve weeks—\$200 per week
- 2-Supervisors—Ten weeks—\$175 per week
- 1-Typist & Clerk—Ten weeks—\$140 per week
- 9-Monitors—Ten weeks—\$150 per week
- Legal Expenses—\$1,000
- Bookkeeping—\$1,000
- Transportation—\$2,000"

that Youth In Government allotted one full time position for a "vendor liaison," a job not even mentioned in its initial budget submission.

The Government's evidence further demonstrated that there was no need for an employee of the sponsor to be present daily at the vendor's offices. First of all, there was no need for anyone to appear on the vendor's premises to oversee either the quality or the quantity of lunches; the monitors employed by Youth In Government paid daily visits to the feeding sites for that very purpose. Second, there was no need for any employee of the sponsor to inform the vendor of defects in the lunches. This function was performed directly by the Department of Agriculture. According to Douglas Andrews, a former U.S.D.A. monitor who testified for the Government, whenever he found defects in the quality of the food, he completed a "violation report." Copies of this report were sent to the sponsor and to the vendor. (Tr. 1060-61). Thus, the vendor was informed directly by the Department of Agriculture of any defects in food quality.

Furthermore, the Government produced substantial—and unrebutted—evidence that Horowitz failed to perform even the tasks supposedly assigned her in her capacity as "vendor liaison". Andrews testified that in early July, 1975, he noticed that the juice containers included in the Youth In Government lunches were defective. Although he immediately advised Puig of the problem, the containers remained defective for a substantial period thereafter. (Tr. 1066-68). If Horowitz was indeed doing anything at all as "vendor liaison," the jury was entitled to infer that the problem would have been corrected far sooner. Her failure to act certainly supports the inference that her job was a sham and that she did nothing.

Two final points strongly support the jury's verdict that Horowitz was a knowing participant in this fraud.

The first is the peculiar manner in which she procured her job. Unlike all other Youth In Government employees (except Sammarco), she did no work toward the establishment of the summer lunch program. Like Sammarco, she appeared suddenly on the eve of the program's commencement and was introduced as the supervisor of those who had worked months to create the program. When some of these individuals protested her hiring to Puig, he stated that she had been hired to satisfy a "political debt" of Buigues (Tr. 288). This debt, the jury could infer, was owed to Joel Barkan, Buigues' immediate superior at the Department of Health, Education and Welfare. Horowitz was a close acquaintance of Barkan's.* On April 27, 1975 and January 19, 1976, Barkan approved salary increases for Buigues totalling approximately \$2,400. The jury was certainly entitled to find that Horowitz was hired not because she had contributed to the creation of the summer lunch program, but because of Buigues' obligations to Barkan.

Finally, even if the jury had accepted the defense testimony that Horowitz was a "vendor's liaison", it could still have inferred that she intended to defraud the Government of the salary paid her. According to her job applications (GX 8, 17), Horowitz lived in Brooklyn. The vendor was located on Bruckner Boulevard in the Bronx, and Arawak was located in Manhattan. Horowitz worked an eight hour day at Arawak. It is thus unlikely in the extreme—particularly given the nature of her supposed duties as a "vendor liaison"—that she spent more than two hours daily at the vendor. If so, she was drawing a salary of \$110 weekly for no more than ten hours work per week. Horowitz possessed a Master's Degree in Social Work from Columbia and, according to her job applications, had held two previous jobs in city and state govern-

* One of Horowitz' character witnesses, Joseph Schwab, who had known Horowitz all her life, thought that Barkan was her husband. (Tr. 838)

ment.* It is inconceivable that she would have assumed that \$11 per hour was a reasonable wage for a federally funded summer job. Her obvious awareness that she was being paid a substantial sum for doing what her lawyer described as "practically nothing" is ample evidence of her intent to defraud the Government.

This Court has refrained from substituting its view of the evidence for that of the jury even in extremely close cases involving "men of blameless lives and respected members of a learned profession." *United States v. Simon*, 425 F.2d 796, 799 (2d Cir. 1969), *cert. denied*, 397 U.S. 1006 (1970); *United States v. Natelli*, 527 F.2d 311, 320-21 (2d Cir. 1975), *cert. denied*, 425 U.S. 934 (1976); *United States v. Kahaner*, 317 F.2d 459, 467-68 (2d Cir.), *cert. denied*, 375 U.S. 836 (1963). It should do no more in the Government's case against Susan Horowitz.

CONCLUSION

The petition for rehearing should be granted and the judgment of conviction affirmed.

Respectfully submitted,

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 Southern District of New York,
 Attorney for the United States
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 Of Counsel.*

* From September 1973 until February 1975, she had worked for the Mayor's Education Task Force, and from May 1971 until May 1972, she had worked for the Bureau of Child Guidance.

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Jeremy G. Epstein being duly sworn,
deposes and says that he is employed in the office of
the United States Attorney for the Southern District
of New York.

two That on the 19th day of January, 1978,
he served a copy of the within brief by placing the same
in a properly postpaid franked envelope addressed:

Richard E. Rieker, Esq.
Dunnington Barthelemy & Miller
161 E. 42nd Street
New York, N.Y. 10017

And deponent further says that he sealed the said envelope
and placed the same in the mail box for mailing at One St.
Andrew's Plaza, Borough of Manhattan, City of New York.

Sworn to before me this

19th day of January, 1978

Jeannette Ann Grayes
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1979

